SUPREME COURT, U. S.
FILED
NOV 16 1966
JOHN F. DAVIS, CLERK

No. 673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF HERMAN J. BOSCH, Deceased,
IRVING TRUST COMPANY, Executor,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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The respondent opposes the granting of the Petition for a Writ of Certiorari.

Question Presented

Where a party comes into the federal court with his rights already fixed by a State tribunal of the highest original jurisdiction, whose decision has precedent value throughout the State and is reported, is the federal court justified in accepting it as an authoritative determination of the law?

Reasons for Dismissing the Petition

The decision in the court below is in accordance with two decisions of this Court which have been established for nearly 30 years. *Blair* v. *Commissioner*, 300 U. S. 5, *Freuler* v. *Helvering*, 291 U. S. 35. In *Blair*, this Court held that a federal court deciding an issue governed by State law should follow the decision of a State intermediate appellate court where that court, having "reviewed the decisions of the Supreme Court of the State," "reached a deliberate conclusion. To derogate from the authority of that conclusion and of the decree it commanded, so far as the question is one of state law, would be wholly unwarranted in the exercise of federal jurisdiction" (p. 10). While in the instant case the dissenting judge in the court below felt that the case law cited by the State court was "inapposite", the State court was of a contrary opinion. There is no suggestion in *Blair* that the State court must come out the same way the federal court would. Indeed in *Blair* the Circuit Court of Appeals, in its first decision, had come to a different conclusion as to Illinois law than later did the Appellate Court of Illinois.

In *Freuler*, this Court declared that the decision of the State court established "the law of California respecting distribution of the trust estate. It is none the less a declaration of the law of the State because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them. What the law as announced by that court adjudges distributable is, we think, to be so considered in applying §219 of the Act of 1921" (p. 45).

1. The petitioner incorrectly characterizes the rationale of the decision in the court below as a holding that where

the taxpayer has had his property rights determined in a State court proceeding, the federal court is conclusively bound by that determination (Pet. for Cert., p. 4). However, the court below quite properly stated that the issue is *not* "whether the federal court is 'bound by' the decision of the state tribunal, but whether or not a state tribunal has *authoritatively* determined the rights under state law of a party to the federal action" (App. to Pet. for Cert., p. 23) (emphasis added).

The court below distinguished its prior decision in *Second National Bank* v. *United States*, 351 F. 2d 489 (C.A. 2), *petition for cert. filed*, 35 U.S.L. Week 3004 (U. S. June 16, 1966) (No. 240), as involving a decree of the Connecticut Probate Court which was not authoritative in Connecticut. The decree of the Connecticut Probate Court did, however, determine the taxpayer's rights.[1]

The petitioner goes on to cite, (Pet. for Cert., p. 7), the statement of the court below that "[t]here is no occasion to inquire into the general law of the state to ascertain what those rights are" (App. to Pet. for Cert., p. 23), as holding that *any* judgment of an inferior State court which is effective as a determination of property rights is conclusive upon a federal court. In view of the pains taken by the court below to distinguish its prior decision in *Second National Bank*, the petitioner has simply misstated the holding.

The petitioner also states that the court below held that it was bound "without regard to whether that decision • • • was incorrect under State law" (Pet. for Cert., p. 4). This is incorrect. The court below made no finding that the decision of the State court was incorrect. In-

1. The collateral attack in *Culver's Appeal from Probate*, 48 Conn. 165, 172-174, cited by the court below in its footnote 6 (App. to Pet. for Cert., p. 26), involved the jurisdiction of a probate court.

stead, the court below held the decision of the Tax Court to be correct (App. to Pet. for Cert., p. 26). And, as the petitioner correctly states (Pet. for Cert., p. 4), the Tax Court accepted the State court's decision as an authoritative exposition of State law.

What the court below held was that when a taxpayer's rights are authoritatively[2] determined by a State court and that determination has value as a precedent and is not contrary to decisions of the State's higher courts, it is to be followed by the federal courts.

Therefore, since the decision below is fully sustained on the holdings of *Blair* and *Freuler*, there is no occasion to reach the issue of whether any determination of the rights of a taxpayer by a State Court is binding on a

2. Judge Friendly questions the authority of the decision of the New York Court in the light of *In re Woodcock's Will*, 19 Misc. 2d 268, 186 N. Y. Supp. 2d 447 (Surr. Ct. Westchester Co.) and Section 146 of the new Article Five of the New York Real Property Law (App. to Pet. for Cert., pp. 31, 32). However, *Woodcock* involved a power of appointment which was exercisable at the time of the partial release because it was a vested interest in a testamentary trust (though subject to defeasance). In the instant case, the power was not exercisable at the time of the purported release for two reasons. The first was that the power was expressly not made exercisable until the death of the grantor. The second was that the trust could have been amended or revoked by the grantor. Because of both of these restrictions on exercise, the power in the instant case resembled the power created in the will of a person who survived the donee in *Matter of Piffard*, 111 N. Y. 410, 18 N.E. 718 (1888). In addition, the court in *Woodcock* recognized that its finding was unnecessary to the decision in that case. Section 146 does make it clear that Section 143 is to be construed to allow the release of powers not presently exercisable. However, Section 143 is a revised version of old Section 183. The wording was changed from "Any power *which is* exercisable * * *" to "Any power, *whether* exercisable * * *" (emphasis added). The fact that the legislature found it necessary to so revise the wording of old Section 183 in making a general revision of the statute dealing with powers is equally open to the interpretation that the legislature recognized that the Section was not originally intended to apply to powers until they were exercisable.

federal court. Accordingly, the petition is based primarily on a rationale of the decision of the court below which is incorrect and is, in any case, unnecessary to support its holding and which therefore does not call for review.

2. On October 4, 1966, P.L. 89-621, 80 Stat. 872 was signed into law. This amendment to §2056(d)(2), Internal Revenue Code of 1954, allows a marital deduction for property passing to persons other than the spouse if disclaimed before the due date of the return and before any property is accepted under the disclaimed interest. This provision is made applicable to estates of decedents dying prior to the enactment of the bill where the due date of the estate tax return is on or after January 1, 1965, with certain limitations.

Had this law been in effect at the death of the decedent in the instant case, it would have been possible for those persons who will take in default of appointment by the decedent's spouse to disclaim any interest in the trust assets and allow the decedent's spouse a general power of appointment, even assuming that the purported partial release was effective. The instant case would not thus have arisen.

It is significant that of the twenty-one cases cited by the petitioner, nine of them involve the amount allowable as a marital deduction.[3]

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3. *Jackson* v. *United States*, 376 U. S. 503; *Old Kent Bank and Trust Co.* v. *United States*, 362 F. 2d 444 (C.A. 6); *Second National Bank* v. *United States*, *supra*, p. 3; *Pierpont's Estate* v. *Commissioner*, 336 F. 2d 277 (C.A. 4, *cert. denied* 380 U. S. 908; *Peyton's Estate* v. *Commissioner*, 323 F. 2d 438 (C.A. 8); *Faulkerson's Estate* v. *United States*, 301 F. 2d 231 (C.A. 7), *cert. denied* 371 U. S. 887; *Stallworth's Estate* v. *Commissioner*, 260 F. 2d 760 (C.A. 5); *Babcock's Estate* v. *Commissioner*, 234 F. 2d 837 (C.A. 3; *Sweet's Estate* v. *Commissioner*, 234 F. 2d 401 (C.A. 10), *cert. denied* 352 U. S. 878.

The enactment of P.L. 89-621 should lead to a significant decrease in litigation involving the effect of State court decrees. Even had the asserted conflict between the circuits arisen here, this Court should grant review in an area of continuing importance in the administration of the revenue laws rather than in litigation concerning the qualification of property for the marital deduction.

The net amount of the deficiency involved in the instant case is $11,173.39. The figure of $70,222.04 set forth as the amount of deficiency in the opinion of the court below (App. to Pet. for Cert., p. 18) is the amount of the deduction.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent.